No. 14687

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SHELLY FISHER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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REPLY BRIEF OF APPELLEE.

I.
STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal grand jury in and for the Southern District of California on August 11, 1954 under Section 174 of Title 21, United States Code. Appellant was charged in Count Three of the indictment with co-defendant Shurley Oliver Burse with the unlawful sale of narcotics, and appellant alone was charged in Count Four of the indictment with unlawful concealment of narcotics.

Appellant was arraigned on August 16, 1954, and on August 17 entered pleas of not guilty to both Counts Three and Four. Trial was begun on October 12, 1954 before the Honorable Ernest A. Tolin, United States District Judge, sitting without a jury (appellant was tried

alone, co-defendant Burse having entered a guilty plea). Trial was concluded on October 15, 1954 and the appellant was found guilty as charged in both Counts Three and Four of the indictment. On November 15, 1954, appellant was sentenced to imprisonment for five years on Count Three and five years on Count Four, the sentences to run consecutively, and was fined $25 on each count. Judgment was entered accordingly and appellant appeals from this judgment.

The District Court had jurisdiction of this cause of action under Section 3231 of Title 18, United States Code, and Section 174 of Title 21, United States Code. This Court has jurisdiction under Section 1291, Title 28, United States Code.

II.
STATUTE INVOLVED.

Section 174, Title 21 of the United States Code, provides in pertinent part as follows:

> "Section 174. Importation of narcotic drugs prohibited; penalty; evidence.
>
> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years.
>
> * * * * * * * *

"Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. As amended November 2, 1951, Chap. 666, Secs. 1, 5(1), 65 Statutes 767."

III.
STATEMENT OF THE CASE.

The indictment returned on August 11, 1954, was in four counts—appellant being charged only in Counts Three and Four.

Count Three of the indictment charges that appellant and Shurley Oliver Burse did, after importation, knowingly and unlawfully sell to Malcolm P. Richards 92 grains of heroin knowing the heroin to have been imported contrary to law in violation of Section 174, Title 21, United States Code.

Count Four of the indictment charges that appellant Shelly Fisher did, after importation, knowingly conceal 450 grains of heroin which heroin had been imported into the United States contrary to law in violation of Section 174, Title 21, United States Code.

Appellant was arraigned on August 16, 1954 before the Honorable Peirson M. Hall, United States District Judge, and on August 17 pleaded not guilty to both Counts Three and Four. On October 12, 1954, trial was begun in the United States District Court before the Honorable Ernest A. Tolin, without a jury, appellant being there represented by his attorneys Martha Malone Jefferson and Harrison M. Dunham (appellant

was tried alone, the case against co-defendant Shurley Burse having been disposed of without trial). Trial was concluded on October 15, 1954 and appellant found guilty by Judge Tolin on both Counts Three and Four of the indictment.

On November 15, 1954, appellant was sentenced by Judge Tolin to imprisonment for five years on Count Three and five years on Count Four, the sentences to run consecutively and appellant was fined $25 on each count.

Appellant assigns as error the judgment of conviction on the following grounds.

I. The evidence is insufficient to sustain the judgment of conviction on either Count Three or Count Four and the trial court erred in not granting appellant's Motion for Acquittal.

II. The evidence against appellant on Counts Three and Four was obtained through illegal search and seizure.

IV.
STATEMENT OF THE FACTS.

About 8:00 a.m. on July 22, 1954, Federal Narcotics Agent Malcolm Richards and two deputy sheriffs of Los Angeles County recorded the serial number of $175.00 [Tr. pp. 12-13] of currency. The Federal Narcotics Agent, under the observation of the deputy sheriffs, then proceeded to the home of co-defendant Shurley Burse, arriving there about 8:30 a.m. [Tr. p. 10]. The Agent had a conversation with Burse and Burse made a telephone call [Tr. p. 11]. After an intervening call the telephone again rang, about 9:30 a.m., and on this occasion Burse addressed someone by the name of "Shel-

ly" [Tr. p. 11]. After that telephone call the Agent again talked with Burse and paid him $155.00 in the currency whose serial numbers had earlier been recorded [Tr. pp. 11-12]. The list of serial numbers is Exhibit 1.

Thereafter, Burse and the Agent left Burse's home and went to 35th Place and Denker Avenue in Los Angeles where Burse left the automobile in which they were riding and was gone for 15 or 20 minutes. When Burse returned he handed Richards a brown paper with an envelope in it which contained narcotics [Tr. p. 13]. The narcotics were admitted into evidence as Exhibit 2, the envelope containing the narcotics was admitted as Exhibit 2a and the piece of paper in which the envelope was wrapped was admitted into evidence as Exhibit 2b and 2c [Tr. p. 204]. A few minutes later Burse was placed under arrest and he and Richards proceeded to the home of a deputy sheriff where they were joined by other officers. Burse was searched and found to have only $25.00 of the money given him earlier that morning [Tr. pp. 15, 63-64]. Burse talked to the officers at this point and the officers and Burse then proceeded to an address on Rimpau Boulevard where Burse pointed out a 1940 Packard automobile [Tr. p. 16].

Thereafter, Burse was taken to the corner of Normandie and Adams Boulevard where in the presence of the officers he made a telephone call. He spoke to some individual and asked to have Shelly call him back at that number [Tr. p. 49]. Two or three minutes later the telephone rang. Burse answered it and said, "Shelly, I have this same guy here that picked up from me this morning. He wants two more spoons of stuff" [Tr. p. 23]. Burse then said, "Meet you over at 36th Street

and 9th Avenue" and then handed the telephone receiver to Agent Richards who heard a man's voice say, "36th Street and 9th Avenue in a few minutes" [Tr. p. 23].

Meanwhile, other officers had remained at the Rimpau Boulevard address and at about 1:00 p.m. (the approximate time of Burse's telephone conversation just recited) appellant was observed to leave the address on Rimpau Boulevard, enter the Packard automobile earlier pointed out by Burse and drive away [Tr. pp. 65-66]. The officers followed appellant who drove to the area of Montclair and Chico Streets in Los Angeles. He left his car for about five minutes [Tr. pp. 79-80]. Here appellant was observed to go to an apartment house on Montclair Street and proceed to a landing where there were two apartments. Here appellant was lost from view for about five minutes [Tr. pp. 148-152]. A key to one of the apartments on that landing was later found on the person of appellant, and the apartment contained narcotics [Exs. 5 and 6, Tr. pp. 67-68, 107-109]. Appellant then left the apartment house and drove to 36th Street and 9th Avenue where Burse and Agent Richards were waiting [Tr. pp. 21, 95]. Burse entered appellant's car and appellant drove away at about 50 miles an hour [Tr. p. 96]. Officers overtook appellant's car and placed him under arrest [Tr. p. 96]. They found on his person $120.00 of the money given Burse that morning by Richards in payment for the narcotics [Tr. p. 97]. The money is marked Government's Exhibit 4. In addition to the money, a key to the Montclair apartment was found on

appellant's person [Ex. 5] which appellant stated was the key to a pool hall on Avalon Boulevard [Tr. pp. 68, 107]. The officers with Burse and appellant, then went to the apartment house on Montclair Street. They proceeded to the landing where appellant had been seen and the key fit the apartment whose address was 3809¾ Montclair Street. At the apartment appellant stated he did not know what the key was for and that he did not know whose apartment it was [Tr. pp. 107-108]. In fact the key had been given by the occupant of the apartment to appellant's wife, in his presence, so that appellant might paint and paper the apartment [Tr. pp. 175-176]. The apartment was searched and heroin [Ex. 6] and other paraphernalia [Ex. 7] were found there [Tr. pp. 70-73, 109-110]. In addition, a portion of a large brown paper sack [Ex. 8] was found at the apartment [Tr. p. 109] from which had been torn the piece of paper in which Burse delivered the narcotics to Agent Richards earlier that day [Exs. 2b and 2c].

Burse testified on behalf of appellant and testified that he first met appellant in 1947, but did not see him thereafter until May, 1954 when he met appellant at the unemployment insurance office [Tr. p. 215]. Burse testified that he borrowed $155 from appellant [Tr. p. 217] and agreed to do some work for him [Tr. pp. 217-218]. Burse stated that he sold the narcotics to Richards [Ex. 2] on the morning of July 22, 1954, and met appellant in the same area and repaid him $125.00 of the borrowed money [Tr. pp. 221-225]. Burse further testified that he

put the narcotics in the Montclair apartment [Tr. pp. 228-229]. Appellant testified that he first met Burse in 1947 and saw him again at the employment office in May, 1954.

> "Well, Mr. Burse said he had been drawing his compensation. He said that was his last check and he wanted to find a job, and he wanted to know if I knew of a place he could find a job" [Tr. p. 277].

and at page 279,

> "* * * So I knew he was a pretty good worker and he didn't have anything and I could rely on him to work, so I advanced him a sum."

Appellant testified that he loaned Burse $155.00. Appellant testified that on the morning of July 22, 1954, he met Burse at 35th and Denker Streets in Los Angeles and Burse paid him $125.00 of the borrowed money [Tr. pp. 282-283]. Appellant further testified that he then went to work at the address on Rimpau Boulevard. He testified that he left there about 1:00 p.m. and stopped by the apartment on Montclair to pick up Burse, but when he found that Burse was not there proceeded to 9th Avenue and 36th Street to meet Burse [Tr. p. 284]. Appellant denied that he put any narcotics in the apartment on Montclair Street or that he ever gave Shurley Burse any narcotics [Tr. p. 285].

V.
ARGUMENT.

Point One.

The Evidence Is Sufficient to Sustain the Judgment of Conviction on Both Counts Three and Four.

The Government's case against appellant is admittedly circumstantial—but that does not imply weakness. The evidence was sufficient to convince the District Judge of appellant's guilt beyond a reasonable doubt and there is an abundance of evidence to support the District Court's judgment.

At about 9:30 a.m., on July 22, 1954, Agent Richards was at the home of co-defendant Shurley Burse. Burse had earlier made a telephone call in Richard's presence [Tr. p. 11] and at 9:30 the telephone rang and Burse had another telephone conversation, this time using the name "Shelly" [Tr. p. 11]. After that conversation, Richards paid Burse $155.00 in currency, the serial numbers of which had been recorded by agents of the Federal Bureau of Narcotics and by Deputy Sheriffs of Los Angeles County [Tr. pp. 12-13]. From the time Agent Richards gave Burse the $155.00 until the time Burse was searched after his arrest, Burse was constantly in the presence of Agent Richards except for *one short period of time*—when Burse left Richards for 15 or 20 minutes and acquired the package of narcotics [Ex. 2]. When Burse was searched a short while later he had only $25 of the money given him by Richards. The only time Burse had the opportunity to spend the money was

in that 15 or 20-minute period. The only reasonable inference that can be drawn is that Burse paid for the narcotics with the money received from Richards.

And where was that money found? It was found on the appellant Shelly Fisher that same afternoon [Tr. p. 97]. The only reasonable interpretation of these facts is that Shelly Fisher delivered the narcotics to Burse.

Under the circumstances that evidence alone is sufficient to support the judgment of the District Court on Count Three of the indictment.

But there is much more. After Burse was placed under arrest and some other matters had intervened, Burse made a telephone call.

> "He talked to some individual and stated that—to have Shelly call back at that number . . ." [Tr. p. 49].

Thereafter the telephone rang and Agent Richards testified as follows [Tr. p. 23]:

> "He said, 'Shelly, I have the same guy here that picked up from me this morning. He wants two more spoons of stuff.'
>
> "Then there was a pause, and then he said, 'Meet you over at 36th Street and 9th Avenue,' and just then he handed the receiver to me and I overheard a man's voice say, '36th and 9th Avenue in a few minutes.' "

This conversation took place at approximately one o'clock on July 22, 1954 [Tr. p. 51]. In the meantime, officers were stationed at the address on Rimpau Street and at about one o'clock they observed appellant Shelly Fisher leave that address. (The time of Fisher's de-

parture is fixed by the testimony of Agent Richards at page 39 where he stated that the officers arrived at Rimpau at about 12:30 p.m. and the testimony of Sergeant Cook who testified that Shelly Fisher left that address approximately one-half hour later [Tr. p. 65]. From there appellant was observed to proceed to the apartment house on Montclair and then go directly to 36th Street and 9th Avenue—the place agreed upon in the telephone conversation with Burse [Tr. p. 95]. At that location Burse entered appellant's car and the car sped away at about 50 miles per hour [Tr. p. 96]. The evidence just recited is abundant to establish the guilt of appellant on Count Three of the indictment, even excluding for the moment the fact that narcotics were later found at the Montclair apartment where appellant stopped enroute to 36th Street and 9th Avenue.

Count Four of the indictment relates to the narcotics found in the apartment on Montclair. There is clearly sufficient circumstantial evidence proving that the appellant Shelly Fisher concealed the drugs at that location. As heretofore noted, appellant was shown to have delivered drugs to Burse on the morning of July 22, 1954. After receiving the telephone call from Burse about 1:00 p.m. on July 22nd asking for more narcotics, appellant went directly to the apartment where the narcotics were stored and then proceeded to meet Burse. At the time of his arrest the officer searched appellant and in addition to the $120.00 that was found on his person, the officers found a key to the apartment on Montclair [Tr. p. 67]. In the kitchen of the apartment near where the narcotics were found the officers found a piece of a brown paper sack [Ex. 8, p. 115]. It was a piece of paper from that sack [Exs. 2b and 2c, pp. 183-184], which contained

the narcotics [Ex. 2] delivered by Burse to Agent Richards on the morning of July 22nd. Exhibits 2b and 2c fit together with Exhibit 8 like pieces to a jig-saw puzzle [Tr. p. 213].

The key to the Montclair apartment had been given appellant's wife in his presence by the occupant of the apartment, Mrs. Frazier, at the time Mrs. Frazier made a business arrangement with appellant to paint and paper the apartment [Tr. pp. 175-176]. Thus, appellant is shown to have been trafficking in narcotics. His supply had to be stored someplace. He was found with a key to an apartment containing narcotics. A sale he is shown to have made was connected to those narcotics by a paper sack. When he received an order for narcotics, appellant went to the apartment where they were stored. Clearly, the narcotics in that apartment were his.

The explanation offered by appellant Shelly Fisher was disbelieved by the District Court. Burse testified that he met appellant in 1947 but didn't see him thereafter for seven years. Then he met appellant at the unemployment insurance office. Burse testified, "I had drawn all my insurance and couldn't find a job . . ." [Tr. p. 216]. Fisher explained [Tr. p. 279], ". . . I knew he was a pretty good worker and he didn't have anything and I could rely on him to work, so I advanced him a sum." The total amount Fisher is alleged to have loaned was $155.00. This much of the story in itself is incredible—that a person in moderate circumstances would loan $155.00 to a virtual stranger who had just drawn his last unemployment check.

All of the testimony by Shurley Burse was unworthy of belief. At pages 237 and 238 of the transcript Burse

testified that he worked for two days painting in the Montclair apartment and then corrected his statement to say that he did cleaning-up work for three or four days. But Mrs. Frazier stated [Tr. pp. 196-197] that the only work done at all on her apartment was one afternoon when Shelly Fisher assisted her. Burse testified [Tr. pp. 240-241] that the narcotics he delivered to Richards on the morning of July 22nd he had taken from his own home—but the wrapper they came in was from a paper sack found in the Montclair apartment. Burse testified [Tr. pp. 272-273] that he took the key from under the mat at the Montclair apartment and kept it and ultimately lost it. Yet it was there on the afternoon of July 22, 1954, when the neighbor came to use the phone [Tr. pp. 198-199]. Burse's testimony was completely impeached and discredited by showing that at the time of his arrest he gave a different version of the facts concerning the sale of narcotics—and one, incidentally, which coincides with the evidence introduced by the Government [Tr. pp. 265-266 and 314-315].

Appellant gave false answers to the arresting officers concerning the key, and denied that he even knew who lived in the Montclair apartment [Tr. pp. 68-70]. The testimony of appellant was impeached by showing a prior conviction for the same offense [Tr. p. 299].

Appellant argues in his brief (p. 7) that in order to convict a defendant on circumstantial evidence, "The proved circumstances must not only be consistent with the hypothesis that the defendant is guilty of the crime, but the proved circumstances must be irreconcilable with any other rational conclusion." The answer to this suggestion is two-fold. Firstly, the evidence introduced at the trial presented no rational hypothesis of innocence.

The story told by appellant and his co-defendant Burse does not reasonably and logically account for the circumstances proving appellant's guilt. Secondly, the proposition cited by appellant is not the law. In *Penosi v. United States* (9th Cir., 1953), 206 F. 2d 529, this Court commented in discussing the rule proposed by appellant, at page 530:

> "This is the language sometimes used in instructions to juries which, in many cases, serves no other purpose than to confuse. . . . If the evidence is sufficient to convince beyond a reasonable doubt that the charge is true it is immaterial whether it be circumstantial or direct."

The Supreme Court of the United States has similarly rejected this type of jury instruction. In *Holland v. United States,* 348 U. S. 121, at pages 139-140, the Court stated:

> "There is some support for this type of instruction in the lower court decisions, . . . (citations) . . . but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. (Citations.)"

It should be added that the argument here advanced by appellant is certainly unwarranted in a trial without a jury which is the situation in the instant case.

That the Government's evidence is sufficient to sustain the judgment cannot be questioned. Compare *Stoppelli v. United States,* 183 F. 2d 391 (cert. den. 340 U. S. 65) where appellant and four others were tried in Oakland, California, under this section. The evidence introduced against Stoppelli was that the narcotics had

come from New York and that Stoppelli was from New York; a fingerprint from the ring finger of Stoppelli's left hand found on one of twelve envelopes which contained narcotics; and a fingerprint expert's testimony that the print was made at a time when the envelope contained a powdery substance and was not more than four weeks old. This court ruled that the evidence was sufficient to uphold the conviction. And in *Penosi v. United States, supra,* this Court ruled the evidence sufficient to uphold the defendant's conviction where the evidence connecting him with the offense consisted of a telegram, an airplane journey, and some wrapping paper found in a hotel room which was not his but in which he was sleeping.

In *Woodard Laboratories v. United States* (9th Cir., 1952), 198 F. 2d 995, at page 998, this Court observed:

> "The usual rule to be followed in determining the sufficiency of evidence to sustain a judgment is well settled. 'It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it.' (Citations.) . . . The fact that some of the evidence admitted is consistent with innocence is not determinative of the sufficiency of the evidence. . . . Substantial evidence is '. . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . .' (Citation.)"

There is clearly sufficient evidence to support the conclusion that appellant delivered the narcotics to Burse on the morning of July 22, 1954 and appellant concealed the narcotics found in the Montclair apartment.

Point Two.

Appellant Has No Standing to Complain of the Alleged Illegal Search and Seizure.

A. Appellant Raised No Objection to the Evidence in the District Court.

It should be noted first of all that there is no evidence in the record that the search of the apartment was conducted without a search warrant. The Government is not here stating that the search was in fact conducted with a warrant but is rather calling attention to the fact that the *record* does not support the statements contained in appellant's brief.

As noted in appellant's brief at page 12 he made no motion to suppress the evidence obtained by the search of the Montclair apartment nor did he object to the introduction into evidence of any of the articles found there. Appellee submits that the question cannot be raised for the first time on appeal.

This Court has ruled squarely on the issue presented herein. A similar situation existed in the case of *Stein v. United States* (9th Cir., 1948), 166 F. 2d 851, cert. den. 334 U. S. 844. This Court stated at page 855:

> "This argument is concerned with the admissibility of the opium in evidence in that it was not seized pursuant to a lawful arrest. The issue as argued here was not raised at the trial. No motion to suppress was made and, furthermore, appellants made no objection to the introduction of the opium into evidence. *It is too late to raise the question for the first time on appeal.*" (Emphasis added.)

The United States Court of Appeals for the District of Columbia has gone even further. In *Cromer v. United*

States (1944), 142 F. 2d 697, the defendant objected at the trial to the introduction of some narcotics on the ground that they had been obtained by an illegal search and seizure. The Court overruled the objection and admitted the evidence. On appeal the defendant again urged that the drugs had been obtained by an illegal search and seizure. The Court stated at page 699:

> "We need not decide this question because the appellant did not move before the trial for the suppression of this evidence or explain his failure to do so."

The case cited by appellant in his brief (p. 11), *United States v. Asendio* (3rd Cir., 1948), 171 F. 2d 122, does not support the proposition that the question can be raised for the first time on appeal. In that case there was no motion to suppress the evidence prior to trial and no objection to the admissibility of the evidence at the trial. But the question was raised in the District Court and urged upon the Court before sentence. In the *Asendio* case the Court of Appeals expressly declined to hold that the defense would be available if raised for the first time on appeal and commented (pp. 124-125):

> ". . . Defendant did bring the matter to the attention of the District Judge who was the trier of the facts, . . . and . . . the Court below did have opportunity to consider and dispose of the issue."

In the instant case the question was never raised in the District Court but was raised for the first time in the Court of Appeals with the filing of appellant's opening brief.

United States v. Ward (3rd Cir., 1948), 168 F. 2d 226, and *United States v. Pincourt* (3rd Cir., 1948), 167

F. 2d 831, simply involve instances of "plain error" within the meaning of Rule 52(b) Federal Rules of Criminal Procedure. In the *Ward* case the trial judge inferentially commented on the failure of an accused to testify. In the *Pincourt* case the entire trial was conducted on the theory that a Government regulation included the prohibition of the *delivery* of certain products. The prosecution was based on that theory, the case was defended on that theory and the jury instructed on that theory. In fact, as discovered for the first time in the Court of Appeals, the Government regulation prohibited *sales only* and did not include deliveries.

> "But where the error is plain and transcends the legal power of the court which made it we may notice it."
>
> *Karrell v. United States* (9th Cir., 1950), 181 F. 2d 981, 986.

There is no question of "plain error" in the instant case. No "error" by the trial court can be pointed out. There is *no* authority which has permitted the issue of an illegal search and seizure to be raised for the first time on appeal.

B. The Right to Complain Because of an Illegal Search and Seizure Is a Privilege Personal to the Injured Class and Appellant Does Not Fall Within That Class.

The principle just cited is so well settled that the Cyclopedia of Federal Procedure, Section 40.79 (Vol. II, p. 160) after citing cases in support of this principle, observes (note 20):

> "Many other decisions so hold that it is deemed a waste of space to cite them, there being no decisions to the contrary."

The Supreme Court has made the same observation in *Goldstein v. United States* (1942), 316 U. S. 114, at 121:

> ". . . The federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized."

The "victim" or "injured party" is limited to one who asserts an interest in the premises searched or the property seized.

> *Curry v. United States* (5th Cir., 1951), 192 F. 2d 571;
>
> *Ingram v. United States* (9th Cir., 1940), 113 F. 2d 966.

In the *Ingram* case this Court stated at page 967:

> "If the search and seizure constituted an invasion of the constitutional rights of Joseph Woods, it did not therefore invade the constitutional rights of appellant, the privacy of whose home or place of abode was not violated, nor can he be heard to complain that the rights of his co-defendant had been invaded, nor can he invoke the benefits of the Fourth and Fifth Amendments in behalf of his co-defendant. . . ."
>
> ". . . The right to complain because of an illegal search and seizure is a privilege personal to the wronged or injured party, and is not available to anyone else. . . . Where the defendant disclaimed ownership of the property seized, he could not complain of the illegality of the search."

The burden is upon one who seeks to suppress evidence to affirmatively assert an interest in the premises searched

or the property seized. In *Gorland v. United States* (App. D. C. 1952), 197 F. 2d 685, 686, the Court observed:

> ". . . the motion to quash the search warrant did not meet the requirements of Rule 41(e) of the Federal Rules of Criminal Procedure, 18 U. S. C. A. Appellant made no claim to ownership or possession of the property seized by police, or to an interest in the premises searched, and has no standing here to contest the seizure."

In the instant case, appellant testified that he had been employed "to paint the interior and hang some paper" [Tr. p. 280] at the Montclair Apartment. When asked if he had visited that apartment, appellant replied only, "Oh, I went there with my wife. I don't remember just when." And when asked if he visited there often, he replied, "Not too numerous, but I have been there" [Tr. p. 298]. Concerning the narcotics found in the Montclair Apartment appellant testified [Tr. p. 290], "He asked me was it mine, and I told him no." Thus, appellant disclaims any interest in the premises searched or the property seized. His entry in the apartment without the owner's consent for any purpose other than papering or painting would constitute him a trespasser. His interest as a worker or employee of the owner is insufficient.

> "Workmen without interest in the premises or in the property seized and not dwelling thereon cannot raise the constitutional question. . . ."
>
> *United States v. Muscarelle, et al.* (2d Cir., 1933), 63 F. 2d 806, cert. den. 290 U. S. 642.

Appellant urges that the case of *United States v. Jeffers* (1951), 342 U. S. 48, supports his contention that he is in a position to complain of the search and

seizure in the instant case. But the *Jeffers* case does not go so far. In that case, police officers in Washington, D. C., searched a hotel room belonging to two aunts of the defendant. The Court stated (p. 50):

> "It appeared from the evidence at the pretrial hearing that the Misses Jeffries had given respondent a key to their room, that he had their permission to use the room at will, and that he often entered the room for various purposes."

Police officers found narcotics in the room and

> ". . . Respondent was arrested the following day on the charges before us, *at which time he claimed ownership of the narcotics seized.*" (Emphasis added.)

The Supreme Court does appear to hold in that case that an interest in the proerty seized is sufficient to give a defendant standing to object to a seizure even though the individual complaining had no interest in the premises searched. The decision in the *Jeffers* case ultimately hinged on his claiming a property interest in the narcotics. The Court said (p. 52):

> "The respondent unquestionably had standing to object to the seizure made without warrant or arrest unless the contraband nature of the narcotics seized precluded his assertion . . . of a *property interest* therein." (Emphasis added.)

Thus, the Supreme Court merely restated the rule that a person has standing to complain of a search or seizure when he possesses an interest in the premises searched *or* the property seized.

Subsequent to the *Jeffers* case, in *Irvine v. California* (1953), 347 U. S. 128, the Supreme Court observed at page 136:

> ". . . and the lower federal courts, treating the Fourth Amendment right as personal to one asserting it, have held that he who objects *must claim some proprietary or possessory interest in that which was unlawfully searched or seized.*" (Emphasis added.)

And in *Scoggins v. United States* (App. D. C. 1953), 202 F. 2d 211:

> ". . . Appellant is without standing to challenge the evidence. . . . Appellant's standing to challenge must rest upon a claim either of possession of the contraband or its seizure from his premises." (Citing the *Jeffers* case.)

See also *Washington v. United States* (App. D. C. 1953), 202 F. 2d 214; *Henderson v. United States* (5th Cir., 1953), 206 F. 2d 300.

An anomalous situation exists with respect to the law on the standing of a person to complain of a search and seizure. For example, appellant's conviction on Count Four rests upon the Government's proof that the narcotics in the Montclair apartment were his—yet the law denies him the right to complain of the search and seizure because he disclaims any interest in the narcotics. But the courts recognize the anomaly and there is no question but that it is existing law. Judge Learned Hand discussed this problem in the case of *Connolly v. Medalie*

(2nd Cir., 1932), 58 F. 2d 629. There Judge Hand said at page 630:

> "We assume for argument that the search and seizure were unlawful; and that any persons aggrieved might suppress the evidence so acquired. None of the petitioners fall within that class . . . The power to suppress the use of evidence unlawfully obtained is a corollary of the power to regain it. The prosecution is forbidden to profit by a wrong whose remedies are inadequate for the injury, unless they include protection against any use of the property seized as a means of conviction. The relief being thus remedial, the evidence has never been thought incompetent against any one but the victim. Conceivably it might have been; it might have been held that the prosecution, though not disqualified from taking advantage of another's wrong . . . should not profit in any wise by its own. But that would obviously introduce other than remedial considerations; the doctrine would then be like that of equity which denies its remedies to one who is not himself scathless. . . . Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma."

To the same effect see *Grainger, et al. v. United States* (4th Cir., 1946), 158 F. 2d 236.

Conclusion.

There is substantial evidence to support the District Court's judgment on both Counts Three and Four. Appellant cannot complain of the alleged illegal search and seizure, firstly because he failed to raise the question in the District Court, and secondly because the right to complain is personal and may not be availed of by one who denies ownership or possession.

Respectfully submitted,

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